

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS**

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Chief Administrative Law Judge of the Office of Administrative Hearings (OAH), pursuant to the authority set forth in section 8 of the Office of Administrative Hearings Establishment Act of 2001 (the "Act") (D.C. Law 14-76; D.C. Official Code § 2-1831.05(a)(7)), gives notice of his intent to adopt, on an emergency basis, the following amendment to add Chapter 29 to Title 1 of the District of Columbia Municipal Regulations (DCMR). These emergency rules prescribe the rules of appellate practice and procedure in matters before OAH. Adoption of these rules on an emergency basis will ensure that there will be published appellate rules of practice and procedure in effect for the new OAH at the time it is scheduled to begin operations on March 22, 2004. Therefore, adoption of these rules on an emergency basis is necessary to protect public health, safety and welfare. These emergency rules were adopted on February 25, 2004, and became effective on that date.

The Chief Administrative Law Judge also gives notice of his intent to take final rulemaking action to adopt the amendment adding a new Chapter 29 to Title 1 DCMR in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register* in accordance with § 6(a) of the District of Columbia Administrative Procedures Act, D.C. Official Code § 2-505(a).

These emergency rules will expire on June 23, 2004, 120 days after their adoption, or upon publication of a notice of final rulemaking in the *D.C. Register*, whichever occurs first.

Title 1 DCMR is amended by adding a new Chapter 29 to read as follows:

CHAPTER 29

OFFICE OF ADMINISTRATIVE HEARINGS APPELLATE RULES OF PRACTICE AND PROCEDURE

Rules

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2900 Appellate Proceedings – In General

- 2900.1 This Rule, and Rules 2901 through 2912, establish additional procedures for all appellate proceedings in this administrative court.
- 2900.2 Unless otherwise provided in this Chapter, Rules 2800, 2807-2812, 2814-2816, 2835-2842, and 2899 of Title 1 DCMR Chapter 28 apply to all appellate proceedings.
- 2900.3 When any procedural matter in an appellate proceeding has not been specifically addressed in these Rules, this administrative court may rely upon the rules of the District of Columbia Court of Appeals as persuasive authority.

2901 Appellate Proceedings – Notice of Appeal

- 2901.1 A party may commence an appellate proceeding in this administrative court only by filing a notice of appeal with the Clerk. The notice shall include:
- a statement, in either the caption or the body of the notice, naming the party or parties filing the appeal;
 - A copy of the order from which the appeal is taken;

- c. A concise statement indicating why the appellant believes the order is wrong;
- d. The signature, printed full name, address, telephone number, and fax number, if any, of the party or parties taking the appeal or of the attorney filing the notice of appeal; and
- e. A certificate of service showing that the notice has been served upon all other parties who appeared in the proceeding and upon the tribunal that issued the order being appealed.

2901.2 A notice of appeal filed on behalf of more than one party may name those parties generally with terms such as “all respondents,” “the respondents except A,” “the respondents A, B, et al.” or similar terms. An appeal shall not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

2901.3 A notice of appeal filed on behalf of a party who is not represented by counsel is considered filed on behalf of that party and his or her spouse if a party, unless the notice clearly indicates otherwise.

2901.4 A notice of appeal filed on behalf of a party who is not represented by counsel who is a co-owner or co-lessee of property is considered filed on behalf of that party and his or her co-owners or co-lessees, unless the notice clearly indicates otherwise.

2901.5 Unless otherwise required by statute, any notice of appeal must be filed within fifteen (15) days after service of the final order from which the party is appealing. The filing date of any notice of appeal shall be the date it is received by the Clerk.

2901.6 If a party timely files a petition for rehearing or reconsideration in accordance with a statute or the rules of the agency that issued the order, the time to appeal as fixed by Section 2901.5 runs from the date of service of the order disposing of the petition.

2901.7 This administrative court has no jurisdiction to extend the deadlines established in Sections 2901.5 and 2901.6.

2902 Appellate Proceedings – Initial Procedures

2902.1 Upon the filing of a notice of appeal, the case shall be assigned to an Administrative Law Judge who shall preside in the case. If separate appeals from the same order are filed, they shall be assigned to the same Administrative Law Judge.

- 2902.2 When an appellate proceeding is assigned to an Administrative Law Judge, he or she shall review the notice of appeal and the underlying order and shall make a preliminary determination whether this administrative court has jurisdiction of the appeal.
- 2902.3 If the presiding Administrative Law Judge preliminarily determines that this administrative court has jurisdiction of the appeal, he or she shall issue an order in accordance with Section 2904.1 directing the filing of the record.
- 2902.4 If the presiding Administrative Law Judge preliminarily determines that this administrative court does not have jurisdiction or that there is a substantial question whether this administrative court has jurisdiction, the Administrative Law Judge shall issue an order directing the appellant to show cause why the appeal should not be dismissed for lack of jurisdiction. Any such order shall contain a statement of the reasons why this administrative court may not have jurisdiction of the appeal. The order shall require the appellant to file a response within fourteen (14) days of service, and shall permit any other party to file a reply within seven (7) days of service of the response. For good cause shown, the Administrative Law Judge may alter those deadlines.
- 2902.5 Upon considering the response to the order to show cause and any reply, the presiding Administrative Law Judge shall issue an interlocutory order deciding whether this administrative court has jurisdiction of the appeal. If the Administrative Law Judge decides that this administrative court does not have jurisdiction, he or she shall dismiss the appeal. If the Administrative Law Judge decides that this administrative court has jurisdiction, he or she shall issue an order in accordance with Section 2904.1 directing the filing of the record.
- 2902.6 Sections 2902.2 to 2902.5 of this Rule shall not preclude any party from filing a motion to dismiss the appeal for lack of jurisdiction.

2903 Appellate Proceedings – Stays

- 2903.1 Filing a notice of appeal does not stay the order being appealed.
- 2903.2 A party seeking a stay of an order pending appeal ordinarily shall first seek a stay from the tribunal that issued the order. A party may be relieved from this requirement if it demonstrates a compelling reason why it is not possible to seek a stay from the tribunal that issued the order.
- 2903.3 If the tribunal that issued the order denies a stay, a party then may seek a stay from this administrative court by filing a motion for stay. The motion shall state the legal reasons for granting a stay and the facts relied upon. All factual assertions shall be supported by an affidavit or by a statement signed in accordance with Section 2821.7 of Title 1 DCMR Chapter 28.

2903.4 A party seeking a stay shall attach to its motion a copy of the order that it is seeking to stay and a copy of the order denying a stay issued by the tribunal below. The party also shall attach any relevant portions of the record in the tribunal below.

2903.5 In deciding whether to grant a stay, the presiding Administrative Law Judge shall consider whether the movant is likely to succeed on the merits of the appeal, whether denial of the stay will cause irreparable injury, whether granting the stay will harm other parties, and whether the public interest favors granting a stay. *See Kufлом v. District of Columbia Bureau of Motor Vehicle Services*, 543 A. 2d 340, 344 (D.C. 1988).

2904 Appellate Proceedings – Filing the Record

2904.1 If the presiding Administrative Law Judge preliminarily determines that this administrative court has jurisdiction of an appeal, or issues an interlocutory order determining that this administrative court has jurisdiction pursuant to Section 2902.5, he or she shall issue an order to the tribunal that issued the order on appeal requiring it to file the record in this administrative court. The record shall consist of the following original documents or copies:

- a. The order from which the appeal is taken;
- b. Any other orders issued by the tribunal in the case;
- c. The papers and exhibits filed with the agency;
- d. Any transcript of the proceedings on file with the agency; and
- e. A certified list adequately describing all documents, transcripts, exhibits and other materials constituting the record on appeal.

2904.2 The tribunal shall file the record within thirty (30) days of service of the order requiring filing, and shall send a copy of the certified list required by Section 2904.1(e) to all parties to the appeal. The presiding Administrative Law Judge may extend the thirty (30)-day deadline for good cause.

2904.3 Any party objecting to the transmission of, or to the failure to transmit, any portion of the record must file a motion stating the objection within fifteen (15) days of service of the copy of the certified list required by Section 2904.1(e). Absent good cause, failure to file such a motion shall preclude a party from later objecting to the sufficiency of the record.

- 2904.4 If the tribunal does not file the record within the deadline established by Section 2904.2, the presiding Administrative Law Judge may direct the parties to the appellate proceeding to appear for a prehearing conference to settle the record. Each party shall bring to the conference copies of any documents in its possession that should be included in the record, as required by Section 2904.1. A party's failure to bring a copy of a document to the conference shall be grounds for precluding that party from arguing that the document should be in the record, absent good cause for the failure.
- 2904.5 Prior to any prehearing conference ordered pursuant to Section 2904.4, the representative of any District of Columbia Government party to the appellate proceeding must confer with the docket clerk or other appropriate official of the tribunal whose order is being appealed and must attempt to obtain a copy of the documents required to be in the record pursuant to Section 2904.1. No later than three (3) days before the prehearing conference, the Government representative must file an affidavit demonstrating compliance with this Section.
- 2904.6 When the prehearing conference is convened, the parties initially shall confer with each other to attempt to agree upon the contents of the record. Pursuant to Rule 2815 of Title 1 DCMR Chapter 28, the presiding Administrative Law Judge may designate a staff attorney or mediator to assist the parties in their discussions. If the parties reach agreement upon the contents of the record, they shall file a copy of the documents constituting the record on the day of the prehearing conference or on such other day as the presiding Administrative Law Judge orders, for good cause shown.
- 2904.7 If the parties are unable to agree upon the contents of the record at the prehearing conference, the presiding Administrative Law Judge shall rule upon all disputes concerning the contents of the record at the conference. The parties shall then file copies of the documents constituting the record on the day of the prehearing conference or on such other day as the presiding Administrative Law Judge orders, for good cause shown.
- 2904.8 If the appellant has been served with an order convening a prehearing conference and fails to appear without good cause, the presiding Administrative Law Judge may dismiss the appeal.
- 2904.9 If the appellee has been served with an order convening a prehearing conference and fails to appear without good cause, the conference shall go forward in his or her absence.
- 2904.10 A Government representative who fails, without good cause, to obey an order requiring compliance with Section 2904.5 shall be subject to

sanctions in accordance with D.C. Official Code § 2-1831.09(8) and Title 1 DCMR Chapter 28.

2904.11 In place of the record on appeal as defined in Section 2904.1, the parties may prepare, sign, and submit to the tribunal that issued the decision on appeal a statement of the case showing how the issues presented by the appeal arose and were decided by the tribunal. The statement must set forth only those facts averred and proved or sought to be proved that were essential to the resolution of the issues. If the statement is accurate, it — together with any additions that the tribunal may consider necessary to a full presentation of the issues on appeal — must be approved by the tribunal and must then be certified to this administrative court as the record on appeal. Any such statement must be filed within the deadline specified in Section 2904.2.

2904.12 The Clerk shall return any record filed by the tribunal that issued the order under review upon the expiration of the deadline for seeking judicial review of this administrative court's order disposing of the appeal, or, if any party seeks judicial review of this administrative court's order, upon the conclusion of all judicial review proceedings. At that time, the Clerk shall also transmit copies of the final order deciding the appeal, any order deciding a motion for reconsideration, and any final order or mandate from a reviewing court.

2905 Appellate Proceedings – Transcripts

2905.1 Transcripts are not necessary in every appellate proceeding. A full or partial transcript is necessary only as required by this Rule.

2905.2 If the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, or that a hearing examiner's ruling at trial was erroneous, the appellant must include in the record a transcript of all the proceedings relevant to the issue. *See Cobb v. Standard Drug Co.*, 453 A.2d 110 (D.C. 1982). Parties should note that, depending upon the issues on appeal, a full transcript of proceedings may not necessarily be required by this Section. A partial transcript may be sufficient if it fully and fairly discloses all proceedings pertinent to the issues on appeal.

2905.3 A recording of the hearing does not satisfy the requirement of a transcript.

2905.4 It is the appellant's duty to ascertain whether all required transcripts are on file with the tribunal that issued the order being appealed and to arrange for the preparation and filing of any transcript required by this Rule that is not on file with that tribunal.

- 2905.5 The appellant must order all required transcripts within ten (10) days of service of an order in accordance with Section 2904.1 requiring the filing of the record. Unless the entire transcript is ordered, within the ten (10) days provided in the preceding sentence, the appellant must serve on all other parties a statement of the issues the appellant intends to present on appeal and a copy of the transcript order. Within ten (10) days of service of the statement of issues and transcript order, any other party shall serve upon the appellant a designation of additional portions of the transcript to be ordered, which are reasonably necessary for full consideration of the issues raised by the appellant. The appellant shall thereafter order those additional portions, or shall seek an order from this administrative court requiring the appellee to order those portions. The presiding Administrative Law Judge shall issue such an order only if the appellant demonstrates that the portions ordered by the appellee are not reasonably necessary for full consideration of the issues raised by the appellant.
- 2905.6 Any transcript ordered by a party pursuant to this Rule shall be filed with this administrative court and not with the tribunal that issued the order being appealed. Unless otherwise ordered by the presiding Administrative Law Judge for good cause shown, a party required to order any transcripts shall file the transcripts within ninety (90) days of the issuance of an order pursuant to Section 2904.1 requiring the filing of the record, and shall make appropriate arrangements with the court reporter to ensure compliance with that deadline. If any transcripts are not filed within the deadline established by this Section, the missing transcripts shall not be considered as part of the record on appeal.
- 2905.7 Any motion to correct a filed transcript must be filed within fifteen (15) days of the filing of the transcript. The presiding Administrative Law Judge may decide all such motions or, in his or her discretion, may refer the motion to the tribunal that issued the decision under review. Failure to file a motion to correct a transcript within the deadline established by this Section shall preclude a party from challenging the accuracy of the transcript, except that the presiding Administrative Law Judge may ignore obvious typographical errors or other errors where the meaning is clear.
- 2905.8 Within thirty (30) days of issuance of an order requiring the filing of the record pursuant to Section 2904.1, the appellant shall file and serve a statement that no transcripts shall be ordered or demonstrating that all required transcripts have been ordered and that satisfactory arrangements for the cost of such transcripts have been made with the court reporter. The Chief Administrative Law Judge may prescribe a form to be used in complying with this obligation.

2906 Appellate Proceedings -- Briefs

2906.1 After filing of the record, the presiding Administrative Law Judge shall issue an order setting a briefing schedule. Briefs generally shall be due according to the following schedule:

- a. If no transcripts have been ordered, the appellant's brief shall be due thirty (30) days after the filing of the record, the appellee's brief shall be due thirty (30) days after service of the appellant's brief, and the appellant's reply brief, if any, shall be due fourteen (14) days after service of the appellee's brief.
- b. If a transcript has been ordered, the appellant's brief shall be due thirty (30) days after filing of the transcript, or thirty (30) days after expiration of the deadline for filing the transcript, whichever is earlier. The appellee's brief shall then be due thirty (30) days after service of the appellant's brief and the appellant's reply brief, if any, shall be due fourteen (14) days after service of the appellee's brief.
- c. For good cause shown, the presiding Administrative Law Judge may alter the briefing schedule set forth above.

2906.2 As an alternative to filing a brief, an appellant may elect to rely upon the statement in the notice of appeal specifying why the order under review is wrong. *See* Section 2901.1(c). An appellant who elects to do so must file a statement notifying this administrative court of its decision to do so no later than the deadline for the filing of the appellant's brief.

2906.3 If the appellant does not file a brief or a statement pursuant to Section 2906.2 before expiration of the deadline, the presiding Administrative Law Judge may dismiss the appeal. If the appellee does not file a brief before expiration of the deadline, the presiding Administrative Law Judge may decide the appeal based solely upon the appellant's submission.

2906.4 The briefs of the appellant and the appellee shall contain the following, in the order specified:

- a. A cover page containing the caption of the case, the docket number, the title of the document (e.g., "Brief for Appellant," "Brief for Appellee," "Reply Brief for Appellant"), and the name and address of the counsel or individual submitting it;
- b. A table of contents, with page references, unless the brief is ten (10) pages or less.
- c. A statement of the issues presented on appeal;

- d. A statement of the case, briefly describing the nature of the case, the prior proceedings that have occurred and the ruling(s) being appealed, and showing how the issues on appeal were raised in the tribunal whose decision is being appealed;
- e. A statement of facts relevant to the issues presented on appeal, with appropriate references to the record;
- f. An argument, which may be preceded by a summary. The argument shall contain the party's contentions and the reasons for them, with citations to the legal authorities and portions of record upon which the party relies;
- g. A short conclusion stating the precise relief sought;
- h. The signature of the individual filing the brief; and
- i. A certificate of service showing that the brief has been served on all other parties to the appellate proceeding.

2906.5 If the appellant elects to file a reply brief, it shall contain the elements specified in Subsections (a), (b), (f), (g), (h) and (i) of Section 2906.4.

2907 Appellate Proceedings – Oral Argument

2907.1 After reviewing all briefs that have been timely filed, the presiding Administrative Law Judge shall decide whether to hear oral argument. If oral argument is to be heard, the presiding Administrative Law Judge shall issue an order setting the date and time for oral argument and the amount of time allotted to each party. If oral argument shall not be heard, the presiding Administrative Law Judge shall issue an order to that effect.

2907.2 If a party who has been served with an order setting oral argument fails, without good cause, to appear for the argument, the presiding Administrative Law Judge shall proceed to hear argument from any party that does appear.

2907.3 Any party that fails to file a brief or a statement pursuant to Section 2906.2 may not be heard at oral argument.

2908 Appellate Proceedings – Final Orders

2908.1 The presiding Administrative Law Judge shall decide each appellate proceeding on the basis of the record established before the tribunal that issued the decision under review, and shall issue an order explaining the reasons for the decision.

2908.2 Unless otherwise provided by statute, the presiding Administrative Law Judge shall set aside the decision under review only if:

- a. The order was issued without observance of procedures required by law;
- b. The order is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the Constitution or applicable law; or
- c. The order is not supported by substantial evidence in the record as a whole. In evaluating the evidence pursuant to this Subsection (c), the presiding Administrative Law Judge shall apply the same standard used by the District of Columbia Court of Appeals pursuant to Section 11(a)(3)(E) of the Administrative Procedure Act, D.C. Official Code § 2-510(a)(3)(E).

2908.3 The presiding Administrative Law Judge shall apply the rule of harmless error.

2908.4 The presiding Administrative Law Judge may affirm, reverse or modify the order under review and may remand a case for appropriate further proceedings. The presiding Administrative Law Judge may reverse or modify an order and/or remand a case only upon grounds presented to the tribunal below.

2909 Appellate Proceedings - Reconsideration

2909.1 A motion for reconsideration may be filed within ten (10) days of service of an order disposing of an appellate proceeding.

2909.2 Unless otherwise ordered by the presiding Administrative Law Judge, no response shall be filed to a motion for reconsideration of an order disposing of an appellate proceeding. No motion for reconsideration shall be granted unless the presiding Administrative Law Judge has ordered the filing of a response and has reviewed that response.

2909.3 The presiding Administrative Law Judge may issue an order denying a motion for reconsideration summarily, or, in the exercise of his or her discretion, may issue an order stating the reasons for denial of the motion. If the presiding Administrative Law Judge grants a motion for reconsideration, he or she must issue an order stating the reasons for the action.

2910 Appellate Proceedings – Costs and Mandate

2910.1 The prevailing party in an appellate proceeding may recover its costs from the adverse party.

- 2910.2 Allowable costs are limited to filing fees in this administrative court and the reasonable cost of any transcripts reasonably necessary for the appeal.
- 2910.3 A prevailing party shall file and serve a statement of its recoverable costs within ten (10) days of service of a final order. The pendency of a motion for reconsideration shall not alter this deadline. The statement shall be accompanied by receipts for all costs claimed, along with sufficient information for this administrative court to determine that the transcript costs are reasonable. Failure to file such a statement waives any claim for costs from the adverse party.
- 2910.4 Any opposition to the recovery of costs must be filed and served within seven (7) days of service of the statement of recoverable costs. Failure to file any such opposition waives a party's right to object to the claimed costs.
- 2910.5 After review of the parties' written submissions, the presiding Administrative Law Judge shall issue an order determining the amount of costs that must be paid to the prevailing party.
- 2910.6 This administrative court shall not issue a formal mandate at the conclusion of an appellate proceeding. Except as otherwise provided in this Chapter, the tribunal that issued the decision under review may not take any action in the case until the record is returned to it pursuant to Section 2904.12.

2911 Appellate Proceedings – Pending Cases

- 2911.1 In every appellate proceeding transferred to this administrative court from the Board of Appeals and Review, the presiding Administrative Law Judge may issue an order requiring the appellant to file a statement specifying whether he or she wishes to continue the appeal.
- 2911.2 Any such statement shall be filed on a form approved by the Chief Administrative Law Judge, and shall be filed within thirty (30) days of service of an order issued pursuant to this Rule. Failure to file such a form in response to an order issued pursuant to Section 2911.2 shall be grounds for dismissal of the appellate proceeding for want of prosecution.

2912-2998 Appellate Proceedings – Reserved

2999 Appellate Proceedings - Definitions

Unless otherwise provided, the definitions in Title 1 DCMR Chapter 28 apply to this Chapter.

Comments on these proposed regulations should be submitted, in writing, to Mr. Tracy J. BeMent, Acting Chief Administrative Officer, Office of Administrative Hearings, 825 North Capitol Street, N.E., Suite 4150, Washington, D.C. 20002, within thirty (30) days of the date of publication of this notice in the D.C. Register. Copies of these proposed regulations are available without charge from the above address.